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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

EBONY M., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, HAZIAH Z., NEVAYEH Z., and RAEJEAN Z. Appellees.	2 CA-JV 2009-0122 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J-16371900

Honorable Kathleen M. Quigley, Judge Pro Tempore

AFFIRMED

Child Advocacy Clinic
By Paul D. Bennett, a clinical professor appearing under Rule 38(d), Ariz. R. Sup. Ct.
Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo
Tucson
Attorneys for Appellee Arizona Department of Economic Security

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K E L L Y, Judge.

¶1 Ebony M. appeals from the juvenile court's order terminating her parental rights to her children Haziah, Nevayeh and Raejean (the children) on grounds of mental illness and chronic substance abuse pursuant to A.R.S. § 8-533(B)(3) and length of time in care under § 8-533(B)(8)(a) and (c). She contends the court's findings under § 8-533(B)(3) and 8(a) were not supported by sufficient evidence and the court lacked "jurisdiction" to enter findings pursuant to § 8-533(B)(8)(a), because the Arizona Department of Economic Security (ADES) had withdrawn that ground from its termination motion at the outset of the termination hearing. Ebony also contends the juvenile court "err[ed] when it failed to require notice to the Blackfeet Tribe despite information that it was probable that [Ebony] was of Blackfeet heritage." For the following reasons, we affirm.

¶2 We first address the notice issue.

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

25 U.S.C. § 1912(a). An Indian child, for purposes of the Indian Child Welfare Act (ICWA), *see* 25 U.S.C. §§ 1901-1963, is one who "is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

¶3 Consistent with the provisions of ICWA, Rule 50(C)(3), Ariz. R. P. Juv. Ct., provides that a court shall "[o]rder the petitioner [in a dependency proceeding] to

obtain verification of [a] child's Indian status from the child's Indian tribe or from the United States Department of Interior, Bureau of Indian Affairs, if the court has reason to believe the child is an Indian child." At the preliminary protective hearing, pursuant to its obligations under Rule 50(B)(1), the juvenile court inquired whether any party had reason to believe the children were subject to ICWA. No party answered the court's inquiry in the affirmative. The court found that ICWA did not apply, and no information was presented to the court during the ensuing dependency and severance proceedings that even suggested the children could be Indian children.

¶4 Ebony contends the juvenile court should have required notice to the Blackfeet Nation because an earlier dependency proceeding for her older children, who had a different father than the three in this dependency, had included notice to the Nation. In that 2003 proceeding, ADES had alleged that the older children "may be" Indian children. Accordingly, ADES properly notified the Blackfeet Nation of that proceeding, stating: Ebony "maybe [sic] affiliated with the Blackfeet Indian Tribe." ADES also notified the Hopi Nation, stating that those children's father "may be Hopi Indian." Neither tribe responded to the notices, and the matter proceeded without either tribe's involvement, eventually culminating in severance of Ebony's and that father's parental rights to the children involved. Following the termination order in that case, the court entered an "in chambers ruling" finding neither child involved in that proceeding was an Indian child. The court's ruling stated that counsel for ADES had informed the court "that the father may either be a member of the Blackfeet Nation of Montana or Hopi

Nation." The record is silent as to the basis for ADES's apparent original belief that Ebony might be affiliated with the Blackfeet Nation.

¶5 Based on this record, we cannot say the juvenile court erred by failing to order ADES to provide notice of the current proceedings to the Blackfeet Nation. Nothing in the record provides any basis for believing Haziah, Nevayeh, or Raejean might be Indian children. Contrary to Ebony's assertion, the record of the earlier proceedings suggested, if anything, that Ebony was not affiliated with the Blackfeet Nation. Indeed, we note that, on appeal, Ebony has not asserted either she or the children are members of, or are eligible for membership in, the Blackfeet Nation. Nor has she expressly challenged the juvenile court's specific conclusion in the termination order that "[t]he children are not Indian children and, therefore, are not subject to [ICWA]." Rather, she challenges only the court's failure to provide notice to the Blackfeet Nation and states she does not know what the Blackfeet Nation's response to such notification might be.

¶6 To the extent Ebony contends ADES acted improperly in failing to remind the court of the prior ICWA inquiry regarding Ebony's older children, nothing in the record supports that contention. As stated above, the record is silent as to the basis for ADES's original determination that notice to the Blackfeet Nation had been warranted in the prior proceeding. That notice had not resulted in confirmation of any connection between Ebony and the Blackfeet Nation, and nothing in the record of the current proceedings establishes there is any connection between the Blackfeet Nation and the children. Moreover, the judge who had ruled that Ebony's older children were not Indian

children subject to the Act was the same judge who had presided over the preliminary protective hearing in this proceeding.

¶7 Next, we address Ebony's contention that the juvenile court's termination order was not supported by sufficient evidence. To justify termination of her parental rights, ADES had the burden of proving at least one of the statutory grounds for severance by clear and convincing evidence and proving by a preponderance of the evidence that severance was in the children's best interests. *See* A.R.S. § 8-533(B); A.R.S. § 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). "The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). Thus, on review, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Id*.

¶8 The children were adjudicated dependent in August 2007 after Ebony and the children's father admitted to allegations in an amended dependency petition. That petition alleged that Ebony reportedly had been "paranoid and delusional and was behaving irrationally" and had tested positive for cocaine, marijuana and codeine. Ebony and the father had agreed in April 2007 to participate voluntarily in services, including drug testing, assessment and treatment. But the parents had not been compliant with those services, and child protective services (CPS) had received a report in May 2007 that

Raejean's medical needs were not being addressed. ADES received another report in June 2007 that the children were being neglected.

¶9 The original case-plan goal of family reunification was changed to severance and adoption in January 2009, after Ebony had failed repeatedly to comply with drug-testing requirements or to participate in services. According to the permanency-planning report, as of September 2008, Ebony had "only provided one drug screen since the inception of this dependency," had not attended any of the four group-testing sessions that had been scheduled for her as part of her psychological evaluation and, despite having participated in a substance abuse evaluation, had not participated in "any follow up treatment" that had been recommended by her evaluator.

¶10 At the court's direction, ADES filed a motion to terminate Ebony's parental rights, and a contested termination hearing was held in August 2009. At the hearing, Ebony admitted she had a history of substance abuse and had been "totally an addict to drugs" for the "first year–years that my kids were taken from me." She claimed, however, that she had been "clean" for nearly a year. But she admitted she had not participated in random urinalysis since October 2008 and there was "no way" to verify her claim. She also admitted having failed to complete other portions of her case plan, explaining: "to tell you the truth, I kind of gave up." When asked on direct examination whether her children could be returned to her at the present time, she responded, "No, ma'am," and suggested that, if given another chance, she would participate in services. She clarified on cross examination that "[w]hat [she] meant" in responding to counsel's question was she thought she "wasn't allowed to get [her children] back," because she

had not completed her case plan. She stated she could "take care of [her] kids now," but she offered no concrete plan for how she would do that.

¶11 On appeal, Ebony contends ADES "did not offer any evidence to show either [her] present-day substance abuse condition or her inability to parent." We disagree. A parent's rights may be terminated under § 8-533(B)(3), upon clear and convincing proof of the parent's inability "to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol" and "reasonable grounds to believe that the condition will continue for a prolonged indeterminate period" of time.[1] Ebony's own testimony acknowledging her history of drug abuse and failure to engage in any services to address the issue was more than sufficient to support the juvenile court's determination that those elements had been proven under the applicable standard. Contrary to Ebony's contention on appeal, the court's reliance on her failure to submit to drug testing did not effectively shift to her the burden of proving her ability to parent or the burden of disproving the allegations in the motion for termination. The juvenile court was entitled to draw a negative inference from Ebony's failure to submit to drug testing and consider her failure to do so in assessing her credibility in claiming that she had been "clean" nearly a year. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205.

[1]To justify termination under § 8-533(B)(3), ADES must also have made reasonable efforts to reunify the family or prove such efforts would have been futile. *See Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, ¶ 12, 123 P.3d 186, 189 (App. 2005). Ebony has not asserted on appeal that ADES failed to make reasonable reunification efforts in this case.

¶12 Because the record contains sufficient evidence supporting the court's termination order under § 8-533(B)(3), we need not address Ebony's arguments regarding the other statutory grounds for termination of her parental rights. *See Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205 (appellate court need not consider challenge on alternate grounds for severance if evidence supports any one ground). We note she has not challenged the juvenile court's determination that severance was in the children's best interests. The order terminating Ebony's parental rights is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge